No. 80-1409

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IN THE

Supreme Court of the United States

October Term, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

WARNER-LAMBERT COMPANY Doing Business Under the Name of WARNER-LAMBERT CO., AMERICAN CHICLE DIVISION, ARTHUR KRAFT, ED HARRIS, JAMES O'MAHONEY and JOHN O'ROURKE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Questions Presented

(1) Whether the decision of the court below that a trial in the instant matter would violate the due process rights of the defendants is correct?

(2) Whether the refusal of the court below to allow the matter to proceed to trial denied the victims of the explosion equal protection of the law?

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The District Attorney of Queens County in the City of New York on behalf of the People of the State of New York petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

Opinions Below

The opinions of the Supreme Court of the State of New York are unreported and set forth in Appendix A. The majority and dissenting opinions of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, are reported at 69 A.D.2d 265 and are set forth in Appendix B. The decision of the Court of Appeals is reported at 51 N.Y.2d 295 and is set forth in Appendix C.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on December 2, 1980 by remittitur of the case to the lower court. The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Sec. 1257 (3).

Constitutional Provisions Involved

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

In 1976 an explosion ripped through the "Freshen-Up" chewing gum section of a plant located in Queens County and owned by the American Chicle Division of the Warner-Lambert Company. Six persons were killed as a result of the explosion and many others were injured.

A Grand Jury investigation was commenced by the Queens County District Attorney in order to attempt to ascertain the cause of the explosion and also to determine whether or not the deaths came about as the result of malfeasance and/or non-feasance of a criminal nature. Evidence was presented both from that produced by the corporate entity as well as that which was unearthed by the District Attorney's investigation. It was determined that the explosion was caused by the ignition of a large quantity of magnesium stearate, a highly explosive dust which was used as a lubricant during the manufacturing process and, because of inadequate cleaning and ventilating procedures, remained suspended in the air in dangerously high proportions. Indeed, the company, despite warnings from their insurance carrier that the "ambient" magnesium stearate created a serious explosion hazard, refused to take the only adequate step to eliminate the immediate danger—by rejecting a proposal to purchase and install a dust control system.

Instead, it continued to use the magnesium stearate in ever increasing quantities while directing its research department to devise a manufacturing process which would eliminate the need for the magnesium stearate. Before the

research department had found this long-range solution, the dust exploded, burning six employees to death.

After an exhaustive investigation, the Grand Jury voted to indict the Warner-Lambert Company and four individuals for manslaughter in the second degree and criminally negligent homicide. The indictments were dismissed for legal insufficiency by a trial court but the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, reinstated the indictments and ordered a trial on the factual issues. Instead, the defendants sought a further appeal to the New York State Court of Appeals. On November 20, 1980, that court reversed the Appellate Division and dismissed the indictments.

Reasons for Granting the Writ

Whether evidence is sufficient as a matter of law has, at least from a defendant's perspective, already achieved the status of a constitutional issue worthy of review not only at the state level, but through the vehicle of Federal *habeas corpus* relief. In *Jackson* v. *Virginia,* 443 U.S. 307, 312-313 (1979), this Court gave every single convicted defendant an issue of constitutional dimension to litigate where none existed before, to wit, whether as a matter of due process "there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt."

The New York State Court of Appeals substituted its judgment for that of the Grand Jury as well as that of the Appellate Division and determined that the evidence adduced before the Grand Jury was "not legally sufficient

evidence in this case on the premise of which a jury could permissibly have imposed criminal liability on any of these defendants."

Such a test is tantamount to a determination that a trial in this matter would violate the defendant's due process rights under *Jackson, supra.* Petitioner disagrees with that due process determination and respectfully urges that this Court grant our petition on this basis.

Under the American system of jurisprudence, a person who is harmed by another is entitled to seek redress and compensation for the wrong by bringing a civil action against the wrongdoer. Our Constitution guarantees that he be afforded due process during the course of his litigation.

The District Attorney is not the "government" but, rather, an elected public official; a lawyer whose sole power and duty is to represent aggrieved citizens in criminal lawsuits against defendants (County Law §700, McKinney's Cons. Laws). That the prosecution is initiated by the filing of an indictment simply strengthens the point, since the indictment represents the action not of any governmental agency, but rather the collective determination of a group of citizens (a Grand Jury) to commence a criminal suit against a citizen. Indeed, there is authority in New York which recognizes the traditional right of a complainant to either himself prosecute a case or engage private counsel to prosecute on his behalf (1958 Opns. Atty Gen. January 21).

Thus there is ample precedent to support the proposition that a citizen who is the victim of a crime has a legitimate legal interest in the outcome of the criminal proceeding which arises out of the criminal act. Having a legitimate legal interest in the case thus logically entitles him to the fundamental constitutional due process rights available to him, including, but not limited to, "the equal protection of the laws" (U.S. Cons., Amendment XIV). Petitioner submits that to permit a perpetrator of a crime to litigate under the umbrella of the due process clause of the Fourteenth Amendment, but to deny a similar right to the victim of the crime is both fundamentally unfair and a denial of the victim's right to equal protection of the laws. Thus we submit that the Court of Appeals has, by its decision, raised due process questions that bear both upon the constitutional rights of the defendants as well as the victims.

Finally, and perhaps most importantly, petitioner submits that this case is an appropriate vehicle for this Court to determine the constitutional issues asserted herein. The decision of the Queens County Grand Jury to indict these defendants is a bold new area of criminal prosecution. This precedent will undoubtedly be followed by other Grand Juries in New York and indeed throughout the nation as attention is focused upon the obligation of corporations and corporate officers to safeguard the health and safety of its employees. This kind of prosecution raises fundamental questions of jurisprudence which will have serious social, economic and even philosophical implications. It is entirely appropriate that this Court seize the opportunity to define the constitutional parameters of such a prosecution.

Conclusion

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1981

Appendices

APPENDIX A

Opinions of the Supreme Court of the State of New York

SUPREME COURT QUEENS COUNTY

CRIMINAL TERM, PART VIII

BY JOHN J. LEAHY, J.

DATED February 15, 1978

IND. NO. 915/77

THE PEOPLE OF THE STATE OF NEW YORK

vs.

WARNER-LAMBERT COMPANY, *et al.*,

Defendants.

The defendants have made an omnibus motion, wherein they apply for an order granting several forms of relief; to wit:

I. To inspect the Grand Jury minutes and dismiss the indictment for insufficiency of evidence;

II. To dismiss the indictment as to all defendants as defective on its face for failure to (i) allege acts constituting the crimes charged; (ii) particularize and apprise each defendant of his alleged criminal conduct; and (iii) establish jurisdiction in this Court;

III. To dismiss the indictment as to Warner-Lambert on the grounds that a corporation cannot be charged with homicide, or in the alternative, to dismiss counts seven through twelve of the indictment on the grounds that a corporation cannot be liable for criminally negligent conduct;

IV. To inspect the Grand Jury minutes and to dismiss the indictment as to all defendants for failure of the Grand Jury to vote properly upon correct instructions;

V. To dismiss the indictment as to all defendants on the grounds that the Grand Jury was illegally constituted; and, in the alternative;

VI. For a Bill of Particulars.

In view of the voluminous, technical and complex nature of the evidence, criminal theory of liability and the rather rare, if not unique, applicability of same to the defendants herein, the Court feels constrained to address itself in detail to the various aspects of this motion.

The indictment herein charges the corporate defendants and four named individual defendants, who are various officers of said corporation, with the crimes of manslaughter in the second degree (six counts) and criminally negligent homicide (six counts).

The defendant Warner-Lambert Company, doing business under the name and style of Warner-Lambert Company, American Chicle Division, maintains a manufacturing plant at 30-30 Thompson Avenue, Long Island City, Queens County, New York. At this plant defendants manufacture several products, including Freshen-Up Chewing Gum.

On November 21, 1976, on the fourth floor of said manufacturing plant—where "Freshen-Up" gum was being made—an explosion occurred, resulting in the death of six employees, and injuries to others.

The Court will address itself to defendants motion ad seriatim, commencing with item I; i.e., the motion to inspect the Grand Jury minutes and motion to dismiss the indictment for insufficiency of evidence.

At the outset, the Court notes that the Grand Jury minutes, numbering approximately one-thousand pages, included testimony of fifty-eight witnesses, comprised of numerous experts—produced by the people and the defendants—employees of the defendant corporation, police and fire department officials, and contractors. Also admitted into evidence were some seventy-one exhibits, consisting of inter-office memorandums of defendants, various insurance company reports, technical data concerning the chemical composition and various properties of the chemicals used at the plant, photographs, autopsy reports, blueprints, floor plans and brochures on the machinery in use at the time.

The chronology of events leading up to the date of the explosion were as follows:

In late 1974 a pilot project to produce "Freshen-Up" gum was commenced by the defendant corporation at the aforementioned Long Island City plant. Originally, only one machine was used and this was located on the first floor of the plant.

In August, 1975 this project was moved to the fourth floor of the plant and at least one machine was set up. Subsequently, and until the date of the accident, there

were six machines in operation and they were utilized on three eight-hour shifts, six days a week.

These machines were designated A, B, C, D, E and F. The only "down time" (not in operation) for the machines was when there was a machine or material breakdown, or to clean the machines. At the time of the explosion at least two of the machines, "C" and "D" were in operation.

The product that these so-called "Uniplast Tabletting Machines" make is known as "Freshen-Up" gum.

The gum is cut from a slab out of the gum mixing machine and then placed in a hopper. This then forms a hollow center in a two-inch diameter "rope" which is automatically filled with jelly to fill the center of the rope. The rope is then reduced in size through a series of four or five sizing rollers to a diameter of one-half inch. The rope is then fed across a transition or lubrication plate. The gum rope is pulled through by the serrated rollers on this bed filled with "magnesium stearate" and the rope goes through a final roller. In some cases it is cooled with an air stream and carried into a round die of approximately twelve inches in diameter with thirty-six and a half punches. These punches are actuated by caws. The front portion of both dies, front and rear sets, are square shaped to produce a square tablet, encasing the jam in the center of the gum. Liquid Nitrogen ("LN_2") was used as a cryogenic agent (i.e., cooling agent) to prevent the gum from adhering to the punches in the Uniplast. In addition, magnesium stearate powder ("MS"), a dry lubricant, was applied to the gum prior to its entry into the Uniplast to prevent the finished pieces from sticking together, or sticking to the machine.

The evidence presented the Grand Jury shows that the utilization of magnesium stearate in the Freshen-Up process created a dust condition, both inert and ambient. Various witnesses testified that the "MS" powder accumulates on the machinery, the floor, the pipes and described it as looking like a "fog", a "mist" or "white haze". The dust necessitated the wearing of face masks by the employees in the "Freshen-Up" department.

Testimony showed that a supply of magnesium stearate, in fifty pound bags, was retained on the premises for daily use, and that a large tank on the roof was used to store the liquid nitrogen on the roof of the plant. However, there was no evidence before the Grand Jury to indicate that the circumstances of retaining this material, in bulk, on the premises, was in anywise proximately related to the explosion.

The entire *factual* crux upon which the prosecution bases its theory of criminal liability turns on the utilization by the defendants of the chemical compounds liquid nitrogen (LN_2) and magnesium stearate (MS); ergo, the explosive and flammable qualities of these substances lies at the root of the question concerning defendants' culpabality under our criminal statutes.

The testimony of several expert witnesses and exhibits before the Grand Jury unequivocally indicate that the chemical compound, liquid nitrogen, basically is non-toxic, non-combustible and vaporizes quickly and without dangerous effects when exposed to room temperatures; furthermore, because of its inherent stability, it is often used in fire extinguishers. This was used in the instant case as a cryogenic agent to prevent the gum from adhering to the machinery.

Magnesium stearate, in bulk, inert or settled form does not create an explosive risk. If ignition is applied to it in such form it would burn or smolder. However, if magnesium stearate dust is dispensed into the air at or above the lower explosive level (LEL), it creates a serious risk of explosion, but another factor—ignition—must present itself, in order to cause an explosion. The lower explosion level is determined by measuring the ratio of a given amount of dust to a specific amount of air. It was shown that the minimum combustible densities of various dusts (e.g., cornstarch, cork dust, peanut hulls, potato starch, etc.) in ounces per cubic foot, are much *more* explosive than magnesium stearate. In fact, testimony was given that powdered sugar dust creates a much greater danger of explosion than magnesium stearate dust.

There is also a "nuisance" level of dust; i.e., the level set by the Office of Safety and Health Administration at which exposure to dust will cause irritation and difficulty in breathing. This "nuisance" level for magnesium stearate is *one three-thousandths* of the lower explosion level.

The source of ignition for something providing a thermal energy to initiate the start of combustion may be produced by a spark, arc, a cigarette or match, or impact. What is alleged as the probable or possible source of detonation in the present case, is "liquefaction"—which is a cryogenic phenomenon by which volatile liquid oxygen is formed as a result of the condensation of the atmosphere due to exposure to extremely cold liquid nitrogen (LN_2)—and which then comes in intimate contact with some conventional lubricant in the machinery, or solvents such as kerosene or magnesium stearate and then same is ignited by some source.

The indictment herein, comprised of thirty-seven pages, charges the defendants in the first six counts with the crime of Manslaughter in the second degree (P.L. §125.15[1]), committed as follows:

"The said WARNER-LAMBERT COMPANY, a corporation, doing business in Queens County under the name and style of WARNER-LAMBERT CO., AMERICAN CHICLE DIVISION, ARTHUR KRAFT, its vice-president, ED HARRIS, its corporate safety director, JAMES O'MAHONEY, its plant manager, and JOHN O'ROURKE, its plant engineer, and divers other officers and high managerial agents, individually and collectively, on or about November 21, 1976, did recklessly cause the death of SAMUEL K. AGYEKUM under the following circustances:

That on or about the month of September, 1974, the said WARNER-LAMBERT CO., AMERICAN CHICLE DIVISION, and the above named individual defendants commenced manufacturing a certain product known as freshen-up gum; that the manufacturing process, due to modifications made to the gum producing machinery, included the application of magnesium stearate powder as a lubricant and the use of liquid nitrogen as a coolant; that said magnesium stearate powder had explosive and combustible qualities; that said magnesium stearate powder was applied to the gum manufacturing process, up to and including November 21, 1976, in such quantities and in such manner which caused the magnesium stearate powder to accumulate on the floor and on all surfaces including overhead fixtures and beams, as well as being suspended in air, which, in turn, caused a condition that was intrinsically and inherently dangerous to the life and safety of the employees in the Freshen-Up Department, and in the immediate vicinity thereof, and was at all times herein mentioned of such nature and character

as to constitute a serious explosion hazard, thereby creating a substantial and unjustifiable risk of death to SAMUEL K. AGYEKUM.

That at all times hereinbefore mentioned, the said defendants, and each of them, were aware of the substantial and unjustifiable risk of death to SAMUEL K. AGYEKUM, by reason of their having received memorandums, reports and complaints from supervisory employees and processing employees that a serious dust condition did exist in the Freshen-Up Department; and by reason of their having received notice, both oral and in writing on or about February 24, 1976 and thereafter up to and including November 21, 1976, that the method and manner, as aforesaid, in applying the magnesium stearate powder to the manufacturing process resulted in a condition in the Freshen-Up Department that constituted a serious explosion hazard.

That at all times hereinbefore mentioned, the said defendants, and each of them, did consciously disregard the substantial and unjustifiable risk of death to SAMUEL K. AGYEKUM, for despite their awareness of the dust conditions as hereinbefore mentioned, and despite the notice and warning received on or about February 24, 1976 and thereafter, the said defendants, and each of them, continued to use the magnesium stearate powder in the Freshen-Up Department, up to and including November 21, 1976, twenty-four hours per day, six days a week, in such quantities and by such methods which resulted in a condition that constituted a serious explosion hazard.

That at all times hereinbefore mentioned, the said defendants, and each of them, did feloniously and wilfully fail, neglect and omit to take any steps or precautionary measures to prevent, guard against or minimize the risk

of a dust explosion, in that they failed to install dust collecting equipment to control or eliminate the accumulation of magnesium stearate powder in the Freshen-Up Department; in that they failed to conform the electrical equipment and wiring in the Freshen-Up Department to either the New York City or National Electrical Code; in that they failed to adequately monitor and control the use of liquid nitrogen, and failed to eliminate all sources of ignition in the areas where dust accumulated; in that they failed to follow all standard texts which set forth all precautions and practices to be taken in areas where hazardous and combustible dust is used; in that they failed to instruct all employees as to the potential fire and explosion hazard inherent where combustible dust is present; all of which acts, or omissions to act, constituted a conscious disregard of a substantial and unjustifiable risk, and which also constituted a gross deviation from the standard of conduct that a reasonable person would have observed under the circumstances.

That due wholly to the acts of said defendants, and each of them, as aforesaid, and as a direct and natural consequence of the dangerous conditions, as aforesaid, which the defendants, and each of them were aware of and recklessly and consciously disregarded, and by their failure to take or provide all or any of the necessary safeguards or precautionary measures as aforesaid, did create or cause to be created, or permitted to exist this inherently dangerous condition of magnesium stearate dust accumulation as aforesaid, which on or about November 21, 1976 ultimately ignited causing a dust explosion with ensuing flame and heat inflicting serious burns on SAMUEL K. AGYEKUM causing his death."

A person is guilty of Manslaughter in the second degree when he "recklessly causes the death of another person".

"Recklessly" is further defined (P.L. §15.05[3]) in the following way:

> "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such results will occur or that such circumstance exists. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

Basically, the crime of Manslaughter in the second degree requires proof beyond a reasonable doubt of the following elements:

(1) That the defendants by their action *created a substantial risk of death;*

(2) And *were aware* of this risk;

(3) That the defendants *consciously disregarded* this substantial and unjustifiable risk; and

(4) The risk itself must be of such a nature and degree that disregard thereof would constitute (a) a *gross deviation,* (b) from the standard of conduct, (c) that a reasonable person would observe in the situation.

Now, the term "recklessly" means to act with a culpable mental state and when such term appears in a statute de-

fining an offense, ". . . it is presumed to apply to *every element* of the offense . . .". (Underscoring supplied; P.L. §15.00[6]; §15.15[2]).

The conduct proscribed by these provisions involves a conscious disregard of a known substantial and justifiable risk of death to others (Peo. v. Montanez, 41 NY 2d 53, 390 NYS 2d 861, 359 N.E. 2d 371 [1976]). " 'Recklessness' is a higher or more culpable form of negligence, and a long '. . . distance separates the negligence which renders one criminally liable from that which establishes civil liability.' ". (Peo. v. Montanez; supra, citing Peo. v. Rosenheimer, 209 NY 115, 123).

Before a person can be held criminally liable for negligently or recklessly causing the death of another, it must be proven that such person engaged in conduct (by acts of omission or commission) which involved a substantial and unjustifiable risk of death and such conduct constituted a gross deviation from the standard of conduct or care that a reasonable person would observe in the situation.

> P.L. §15.05[3], [4]; see also Hechtman, Practice Commentaries, McKinney's Consolidated Laws of New York, Book 39 P.L. §15.05)
>
> "Significant element in the concept of acting 'recklessly', within subd. 3 of this section [P.L. §15.05] prohibiting manslaughter in the second degree, is scienter, i.e., a showing that the defendant was aware of and *consciously disregarded* a substantial and unjustifiable risk. People v. Cruciani, 1975, 36 NY 2d 304, 367 NYS 2d 758, 327 N.E. 2d 803." (Underscoring supplied.)

The issue of "recklessness" is resolved by answer to the queries: (1) Did there exist a substantial and unjustifiable risk of explosion (that may result in death) that (2)

all defendants were aware of and that (3) all defendants consciously disregarded.

First—the Court finds that the evidence before the Grand Jury on the issue of "substantial and unjustifiable risk of death" is equivocal and does not meet that burden of proof, as being proved beyond a reasonable doubt. The presence and utilization of the chemicals liquid nitrogen and magnesium stearate was shown to be quite common and in general use in industry. The chemical composition of both substances did not lend itself to danger of explosion. There were no violations filed by the fire department, health department, police department or any other government agency against any of the defendants. The suppliers of both substances did not deem it necessary to alert any of the defendants as to any explosive qualities of the liquid nitrogen or magnesium stearate. When defendants were alerted by their insurance carrier that intervening factors —that is, the liberation of magnesium stearate dust into the air of the Freshen-Up area ". . . *could* present an explosion hazard . . ." and that ". . . there is a *possibility* that dust concentrations could be in the explosive range . . ." (underscoring supplied) the defendants enacted many immediate measures to eliminate the one primary *possible* danger—ambient magnesium stearate dust—that, if present in the air in sufficient quantities could possibly, if given a source of ignition, result in an explosion. However, the insurance company apparently did not feel that there was an *imminent* danger of explosion as the records indicate that they did not forward the defendants the written report as aforesaid until more than two months after their inspection.

The results of defendants' efforts manifests itself in documentary evidence. The same insurance carrier, after

an inspection and just two months prior to the explosion, gave a written report to the defendant, that their inspection showed that the magnesium stearate powder concentration *had been reduced* by seventy-five percent (75%) of the original concentration and ". . . thus the present concentration is well below the lower explosive limit." The inspector also testified before the Grand Jury and stated she found the plant to be fairly dust free and in answer to the question "In any event your examination did not show a condition that was above the lower explosive limit?", she answered, "That's right. I—we never know for sure . . .".

Finally, on this point it is noted that the consensus of expert opinion given before the Grand Jury as to what caused the explosion was the cryogenic phenomenon called "liquefaction"—and the ignition source therein appears to be left to pure conjecture.

As to the second element as to the "awareness" of all defendants (of a substantial and unjustifiable risk—if there be any) the Court initially notes that the word "aware" is defined on Page 152 in Webster's Third New International Dictionary as ". . . marked by realization, perception of knowledge." The evidence before the Grand Jury is unequivocal and uncontradicted in showing that defendants, as early as the latter part of 1975 and until February, 1976, were conducting tests concerning the amount of ambient magnesium stearate dust in the air, to *determine its hygienic effect* on its employees. In any event, when alerted by their insurance carriers—two months delayed—report of a *possible* danger of explosion they effectuated various measures (that the Court will fully set forth hereafter) that resulted in their being subsequently advised in September of 1976 that the level of ambient magnesium stearate dust was below any explosive

level. This opinion and reassurance coupled with the fact that the insurance carrier's original inspection and report warning of danger preceded the explosion by some six to nine months, creates a very strong reasonable doubt that *on or about the date of the explosion* the defendants *were "aware"* of the danger of the explosion.

In reference to the third crucial element of the term "recklessness", that all defendants "consciously disregarded" the risk—the court finds that the evidence before the Grand Jury is overwhelming in proving that all defendants, in their various capacities, made numerous innovations in the Freshen-Up process to eliminate, not only the ambient magnesium stearate dust, but were also attempting to totally eliminate the use of magnesium stearate entirely.

The statutes do not define the term "consciously disregards" but the dictionary defines the word "conscious" as aware or knowing, and further defines the word "disregard" as "to pay no heed to . . . neglect . . .". The Grand Jury record is replete with evidence of inter-office memorandums among the defendants and numerous others recommending the purchase of dust collectors and vacuum cleaning equipment, and obtaining quotations on same; recommendations for the replacement of the Uniplast machines that would eliminate the need for using magnesium stearate; particularly strong memorandums and recommendations by the defendant, James O'Mahoney, pertaining to obtaining equipment to remove the ambient dust and methods of cleaning up the area. These were proposals and suggestions within the defendant corporation, which are necessary procedures in modern day corporate operations and industry.

In addition, however, corrective steps and actual changes that were effected, included: (1) conversion of one of the six lines to a system which totally eliminated the use of magnesium stearate on that line; (2) reducing the number of stages during the production process at which magnesium stearate was used [from three to one]; (3) restrictions on the use of magnesium stearate by the employees [which effectuated a 75% to 90% reduction in the use of magnesium stearate]; (4) restrictions on the use of air hoses for cleaning machinery; (5) the employment of a coarser magnesium stearate which greatly eliminated flotation dust; (6) the closing down of the entire Freshen-Up department during two weeks in August for a thorough cleaning; and (7) daily and weekly removal of magnesium stearate dust that involved many man-hours.

The effectiveness of these various actions on the part of the defendants was evidenced by the inspection and report of the Factory Mutual Insurance Company in September, 1976, and as testified to by a representative from same before the Grand Jury, that showed the use of magnesium stearate was reduced from between 75% to 90% which resulted in a safe level of ambient dust—and which concluded that the danger of a dust explosion had abated.

This evidence of the actions taken by the defendants flies in the face of the charges in the indictment that the defendants ". . . did feloniously and wilfully fail, neglect and omit to take *any steps or precautionary measures* to prevent, guard against or minimize the risk of a dust explosion . . .".

The people's position in averring in the indictment that defendants showed a conscious disregard of the risk by failing to eliminate *all* sources of ignition; by failing to

instruct *all* employees as to . . . . fire and explosion hazard . . . .; and in failing to follow *all* standard texts is untenable.

These are not the criteria evincing the necessary culpable mental state of recklessness on the part of the defendants.

The Grand Jury Minutes are replete with evidence showing the defendants' numerous plans, recommendations, studies and actual change of all major operations in the Freshen-Up Department with a view to minimizing the ambient magnesium stearate dust to a level far below any danger point and, more important, to totally eliminating the necessity of using magnesium stearate. Elimination of the ambient dust would have eliminated all risk and the use of liquid nitrogen, or the electrical wiring question, or the use of dust collecting equipment would have all become academic.

The Court will now proceed to the counts of the indictment numbered seven through twelve; wherein the defendants are accused of having committed the crime of Criminally Negligent Homicide.

First, the Court notes that one of defendants' otherwise excellent and thorough memorandums of law, is inaccurate in suggesting that in a case of Criminally Negligent Homicide defendants' failure to perceive a substantial and unjustifiable risk of death must not only have been unreasonable, ". . . but depraved, wanton and gross.". Defendants cited the cases of *People* v. *Haney,* 30 NY 2d 328, 334, 333 NYS 2d 403, 408 [1972], and *People* v. *Taylor,* 31 AD 2d 852, 297 NYS 2d 192 [3d Dept] 1969, in support thereof. A reading of those cases shows that the courts therein did not use the word "depraved" and, in fact, termed the use of the words "wilfull, wanton negligence" as the "apex of ambiguity".

Criminally negligent homicide is defined as follows: "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."

"Criminal negligence" as defined by Penal Law, section 15.10, subdivisions 4 and 5, states:

> "A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

The distinction between this and Manslaughter, Second Degree, in [*sic*] provided in section 15.05, subdivisions 3 and 4, of the Penal Law which specifically describes the mental state requisite for each. The *reckless* offender (manslaughter, second degree) is *aware* of the prescribed risk and *consciously disregards* it while the *criminally negligent* offender is *not aware* of the risk created and, hence, cannot be guilty of consciously disregarding it. (People v. Haney, supra, citing Comm. Staff Notes, Gilbert Criminal Code and Penal Law [1971] p. 2-248.) "Since the criminally negligent offender's liability arises only from a culpable failure to perceive the risk, his culpability is obviously less than that of the reckless offender who consciously disregards the risk." (People v. Haney, supra, citing Model Penal Code, Tent. Draft No. 9 [May 8, 1959] §201.4 at p. 53). The culpability of a person charged with criminal negligence, however, is appreciably greater than that required for ordinary civil negligence by reason of the substantial and unjustifiable character of the risk involved

and the factor of gross deviation required from the ordinary standard of care. (Comm. Staff Notes, Gilbert Criminal Code and Penal Law, supra.)

> "Criminally negligent homicide, in essence, involves the failure to perceive the risk in a situation where the offender has a legal duty of awareness. It, thus, serves to provide an offense applicable to conduct which is obviously socially unjustifiable. It proscribes conduct which is inadvertant as to risk only because the actor is insensitive to the interest and claims of other persons in society." (People v. Haney, supra)

Succinctly stated, the intrinsic nature of the crime of criminally negligent homicide is comprised of a tri-faceted consideration:

(1) *Culpable failure* to perceive

a

(2) substantial and unjustifiable risk

and

(3) the failure to perceive the risk is so flagrant as to be deemed a *gross deviation* from the standard of care that a reasonable person would observe.

The Court does not have the aid or guidance of a definition in our statutes of the word "culpable" and a perusal of the dictionary only thickens the fog of ambiguity in showing that the word is derived from the latin "culpa" meaning "negligence or fault"; and which was found to have been distinguished in three grades under the Roman Law; to wit, gross negligence, ordinary negligence and negligence of a careful person.

The Court does not feel constrained to probe further into the meaning of the term "substantial and unjustifiable

risk'' as under the facts and circumstances of the case at hand the Court finds that the risk to be perceived herein was a risk of explosion and further that such is clearly one that is substantial and unjustifiable.

To paraphrase the dictionary, the term ''gross deviation'' is defined as a variation from an established standard; that is out of all measure; beyond allowance; flagrant.

It is patently clear that the first element, ''culpable failure to perceive the risk'', is the cornerstone that must first be laid or found upon which there must then follow a finding as to the second and third elements. If the evidence does not show a failure to perceive a risk—culpable or otherwise—there is no need to pursue a finding as to ''substantial and unjustifiable'' or ''gross deviation''.

It is axiomatic that there must be sufficient evidence presented to the Grand Jury to sustain *each* and *every* element required for the commission of an offense.

As stated in detail heretofore, the totality of the evidence presented to the Grand Jury, both in testimony and documentary evidence, can lead to but one inescapable conclusion—that the defendants were, for many months, exercising their various *corporate responsibilities*, in seeking solutions to the ''ambient dust'' problem that created the primary risk of explosion. The evidence, again, is crystal clear and voluminous (detailed heretofore) in showing the actual changes in procedure enacted by the defendants in their various corporate capacities to eliminate any danger of explosion.

Our Court of Appeals, in addressing itself to this very complex problem concerning the area of culpability and liability (mens rea) in criminal negligence very cogently stated (citing People v. Eckert, 2 NY 2d 126, 130; People v. Angelo, 246 NY 451, 457):

> . . . it would seem sufficiently clear that for proper determination of these questions, two main considerations should be emphasized. Firstly, criminal liability cannot be predicated upon every careless act merely because its carelessness results in another's death; and, secondly, the elements of the crime "preclude the proper condemnation of inadvertant risk creation unless 'the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong' " (Model Penal Code, Tent. Draft No. 9, supra, at p. 53, citing Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 417.)

The record is replete with the inter-corporate memorandums and letters amongst the individual defendants evincing an awareness of the dust condition (whether for hygienic or safety reasons) and a strong resolve and determination to minimize the risk to well within safe standards—which defendants were certainly led to believe they had accomplished by the independent report of their insurance carrier dated September of 1976 (supra) and the absence of *any* violations filed against the defendants by *any* governmental authority.

The duty and authority of the Court on this motion and at this juncture of the case is clearly enunciated in the statutes and case law. The Criminal Procedure Law requires that there be presented before the Grand Jury "legally sufficient evidence" to sustain each element required for the commission of an offense and "reasonable cause" to believe that the defendants committed the offense. (CPL §190.65).

The legally sufficient evidence must establish (if accepted as true) *every* element of the offense charged and the defendants' commission thereof (CPL §10.10).

In order to sustain the indictment this Court must find that the evidence presented to the Grand Jury would, if unexplained and uncontradicted, warrant conviction by a trial jury; i.e., proof of each essential element beyond a reasonable doubt.

(People v. Potwora, 44 AD 2d 207, 354 NYS 2d 492, 496 [4th Dept. 1974]; People v. Leary, 280 AD 679, 117 NYS 2d 392, 394 [3d Dept. 1952] revd on other grounds, 305 NY 793, 113 N.E. 2d 303 [1953]; People v. Ward, 37 AD 2d 174, 323 NYS 2d 316, 318 [1st Dept. 1971].)

Upon consideration of the totality of the circumstances involving all of the defendants' conduct, the Court concludes that the evidence presented before this Grand Jury was insufficient in law and fact to sustain the charges of manslaughter in the second degree, criminally negligent homicide, or any lesser included offense.

It behooves the Court to note that the unbelievably arduous task faced by the prosecution in the presentment of the voluminous and highly technical evidence in this case to the Grand Jury, and the laborious and exhaustive efforts made in reference thereto, were nothing short of heroic, and in keeping with the finest and highest traditions of the law.

Accordingly, the motion to dismiss the indictment is granted to the extent set forth in this decision.

In view of the foregoing ruling, the second, third, fourth, fifth and sixth divisions of the defendants' omnibus motion become moot and the Court need not rule on them.

The bail is exonerated and defendants are discharged.

JOHN J. LEAHY
J.S.C.

SUPREME COURT QUEENS COUNTY

CRIMINAL TERM, PART 8

BY JOHN J. LEAHY, J.

DATED March 29, 1978

IND. No. 915/77

THE PEOPLE OF THE STATE OF NEW YORK

vs.

WARNER-LAMBERT CO., doing business under the name and style of WARNER-LAMBERT CO., AMERICAN CHICLE DIVISION, ARTHUR KRAFT, ED HARRIS, JAMES O'MAHONEY and JOHN O'ROURKE,

Defendants.

This is a motion brought by the People for an order granting reargument of an order of this Court dated February 15, 1978, wherein the defendants' motion for a dismissal of the indictment was granted and, upon such reconsideration, seeking a further order denying defendants' aforesaid motion to dismiss the indictment.

The motion for reargument is granted and, upon reconsideration, the original decision is adhered to.

JOHN J. LEAHY
J.S.C.

APPENDIX B

Majority and Dissenting Opinions of the Appellate Division, Second Judicial Department

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

v

WARNER-LAMBERT COMPANY, Doing Business Under the Name of WARNER-LAMBERT CO., AMERICAN CHICLE DIVISION, ARTHUR KRAFT, ED HARRIS, JAMES O'MAHONEY and JOHN O'ROURKE,

Respondents.

Second Department, July 9, 1979

OPINION OF THE COURT

Per Curiam.

This is an appeal by the People (1) from an order of the Supreme Court, Queens County, dated February February 15, 1978, which granted the defendants' omnibus motion, *inter alia,* to inspect the Grand Jury minutes and, upon inspection, dismissed the indictment against them, and (2) from so much of a further order of the same court, dated July 26, 1978, as upon reargument, adhered to its original determination.

The question presented on this appeal is whether the evidence before the Grand Jury was legally sufficient to warrant the indictment of each of the defendants on six counts of manslaughter in the second degree and six counts of criminally negligent homicide.

Criminal Term held that the evidence was not sufficient and dismissed the indictment. Because we conclude that the evidence is sufficient, we reverse and direct that the indictment be reinstated.

FACTUAL BACKGROUND

The corporate defendant, Warner-Lambert Company (Warner-Lamber), maintains a plant at 30-30 Thompson Avenue in Long Island City, Queens. At that facility several products, including Freshen-Up chewing gum (Freshen-Up), are manufactured. The defendant Arthur Kraft (Kraft) is Warner-Lambert's vice-president in charge of manufacturing. Defendant Ed Harris (Harris) is the director of corporate safety and security for Warner-Lambert. Both Kraft and Harris have their offices at Warner-Lambert's corporate headquarters in Morris Plains, New Jersey. James O'Mahoney (O'Mahoney) is the plant manager of the manufacturing facility in Long Island City, and John O'Rourke (O'Rourke) is its plant engineer.

On November 21, 1976 Freshen-Up was being manufactured on the fourth floor of the Long Island City plant. On that date an explosion occurred which resulted in the death of six employees and injury to numerous others. The indictment stems from these six deaths.

In 1974 a pilot project for the manufacture of Freshen-Up was begun by the corporate defendant using machines known as uniplast tabletting machines. At first a single

machine, located on the first floor of the plant, was used. Eventually six machines (designated A, B, C, D, E and F) were put into operation on the fourth floor of the Long Island City plant. The machines were operated 24 hours a day (in three eight-hour shifts), six days a week. The only time during the work week that a particular machine would not be in operation was when it was being cleaned or if it had broken down.

In the actual manufacturing process, a slab of gum is produced by a "gum-mixing" machine, after which a section of the slab is passed along to a "hopper" which forms a hollow center in the "rope" of gum. The hollow center is then filled with a jelly-like substance. The rope is next fed into a bed filled with magnesium stearate (MS), a dry lubricant, which is applied by hand to prevent the finished pieces of gum from adhering either to themselves or the machinery. The uniplast machines have die-cut punches which form the gum into square tablets, encasing the jelly center. Liquid nitrogen is used as a cryogenic or cooling agent to prevent the gum from sticking to the punches of the uniplast machines.

It is undisputed that the use of magnesium stearate created a "dust condition" on the fourth floor of the corporate defendant's plant. Some of the MS tended to accumulate at the base of the machines and on the overhead pipes (thus becoming inert), but the remainder of the dust remained ambient, that is, dispensed throughout the atmosphere in the area. In bulk or settled form, MS does not create a risk of explosion, and if ignited, will either smolder or burn. If MS is airborne at or above a certain concentration, however, it creates a serious risk of explosion if ignited. The point at which an explosion can occur is known as the "lower explosion level" (LEL).

Liquid nitrogen, which was also used in the manufacturing process, is nontoxic, noncombustible, and vaporizes quickly at room temperature. Normally, its usage is not considered hazardous.

It appears without contradiction that ambient MS dust will not explode unless an external source of ignition (e.g., a spark or a lighted match) is supplied. However, it also appears that a dust-type explosion can be precipitated by a cryogenic phenomenon known as "liquefaction", which occurs when highly volatile liquid oxygen is formed as a result of the condensation of air due to its exposure to a source of intense cold, for example, liquid nitrogen. The liquid oxygen can then collect, and if subjected to ignition, will explode. Moreover, because of its own volatile properties, the liquid oxygen will detonate easily, e.g., as the result of sharp impact. This primary explosion could, in turn, supply the ignition which could set off a secondary explosion of sufficiently concentrated MS dust.

THE EVIDENCE BEFORE THE GRAND JURY

The uniplast machines used by Warner-Lambert at its Long Island City plant were sold to it by the Robert Bosch Packaging Corporation, which designed the machines for the manufacture of hard candy rather than gum. The seller's representative testified before the Grand Jury that the machines were not suitable for operation at very low temperatures and that when put to normal use they would operate at between 150 degrees and 160 degrees Fahrenheit. Other testimony indicated that the temperature of the liquid nitrogen inside the "D" machine (the situs of the explosion) was *minus* 320 degrees Fahrenheit, cold enough, incidentally, for liquefaction to occur. In addition,

the Bosch representative stated that the machines were not designed for use in conjunction with either liquid nitrogen or magnesium stearate, and that the manufacturer had not modified the machines to accommodate those substances. The motors of the uniplast machines were described as not being "dust proof", but were capable of such modification had the user so desired.

The plant's chief electrician testified that he had observed the use of MS in the pilot Freshen-Up project, and had specifically asked defendant O'Rourke if the machines and the wiring in the Freshen-Up department should be dust-proofed. O'Rourke allegedly answered in the negative.[1]

On the day before the explosion one of the employees who worked in the area noticed that the "D" machine was smoking or burning, but was told by his foreman not to worry about its condition. Other evidence indicating that the "D" machine was not operating normally included the following: the floor on which that machine was resting was some 12 inches thick, and yet the paint on the ceiling below that spot was peeling. This peeling was attributed to the fact that the "D" machine was operating at a colder temperature than the others.

Immediately prior to the explosion only the "D" machine was operating and certain of defendants' employees were involved in clearing away the settled MS dust by the use of push brooms and airhoses. The use of airhoses to clear away the magnesium stearate had the effect of blow-

1. There was also testimony by an employee of the United States Occupational Safety and Health Administration that the electrical equipment and wiring in the Freshen-Up department were in violation of the requirements of the national electrical code for areas employing magnesium stearate.

ing the settled dust back into the air, thus increasing the ambient concentration.

An expert in cryogenics confirmed the fact that the "peeling paint" was due to the "D" machine having gotten excessively cold from the use of liquid nitrogen, and stated that his postexplosion examination of that machine revealed that its cast iron base had become fractured, possibly as a result of the extreme cold. Once liquefaction has occurred, it was his opinion that a breakage of metal in the area of the base could provide a sufficient impact to cause an explosion.

As for the quantity of ambient MS dust, there was evidence that the foregoing was at or above the lower explosion level during normal operating conditions, and that an inspection by Warner-Lambert's insurer in February of 1976 (during which the inspector met with O'Rourke and representatives of Harris' office) resulted in written recommendation designed to reduce the ambient MS hazard. Among the recommendations were the following: (1) installation of a central vacuuming system for continuous dust collection; (2) a "housekeeping" program to try to reduce the level of ambient dust; (3) upgrading the electrical equipment so that it would be suitable for use in a dustry atmosphere; and (4) some form of "explosion venting" to relieve pressure in the event of an explosion. A formal report prepared on the basis of this inspection was mailed to Harris in May of 1976 and a letter accompanying that report specifically stated that there was *a hazard of an explosion due to the level of MS dust.* A second letter sent to Harris in June of 1976 reiterated the risk of an explosion, but in a corporate memorandum forwarded to O'Rourke and O'Mahoney after receipt of this report, it is

stated that O'Rourke had outlined revisions which would negate the need for the recommended improvements. The propriety of this conclusion is open to serious question.

Also in June of 1976, the plant's operations manager sent a memorandum to O'Mahoney discussing the problem of dust control and concluding that the use of magnesium stearate should be eliminated.[2] Warner-Lambert did not act upon this memorandum, although a "coarser" form of magnesium stearate was apparently substituted in an attempt to alleviate the situation.

Subsequently, in July of 1976, a meeting was held to discuss the need for an exhaust system to eliminate the problem of ambient MS dust, and Kraft and O'Mahoney were in attendance. As a result of this meeting the idea was rejected. Kraft, it was established, had observed the Freshen-Up operation and was aware of the problem with MS dust, as was codefendant O'Mahoney. In addition, the projection engineer for the Freshen-Up department had worked out a dust collection system and submitted his recommendations and cost estimates to Kraft for approval. This proposal was also rejected.

During August of 1976, it appears that the quantity of MS in use at the plant was reduced, and that the plant itself was closed for a period of thorough cleaning. Employees testified, however, that within two to three weeks after the cleanup the condition had worsened and that the ambient MS dust was often as thick as a fog.

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2. Other testimony indicated that the use of magnesium stearate had been eliminated at one of the uniplast machines (the "A" machine) at a cost of $40,000, but that the remaining machines had not been converted. It also appears that MS is not employed in the manufacture of Freshen-Up gum at another of the corporate defendant's plants.

In September of 1976 an engineering consultant for Warner-Lambert's insurer was sent to the plant, and she reported that the use of magnesium stearate had been "cut back" by 75%. However, her report was based upon an employee's representation that usage had been reduced by 90%, a figure which she, herself, considered an exaggeration.

On November 15, 1976 a memo was sent to O'Mahoney describing how the air-conditioning system in the plant was malfunctioning due to the presence of MS dust, but again no action was taken. There had been a similar air-conditioning malfunction in April of 1976. There was also testimony that the ventilation system in the Freshen-Up production area was neither adequate nor designed for the removal of airborne dust. In fact, the system, which employed recirculation, tended to increase the concentration of airborne dust.

On the defendants' case, various Warner-Lambert employees involved in fire protection and industrial hygiene testified that there was *no* danger of an explosion from MS dust at the plant and that their surveys made in November of 1975 and June of 1976, showed that the concentration of MS dust was many times smaller than the LEL. It was also stated that the insurer's report prepared after its February, 1976 inspection was inaccurate, and that no measurements of dust concentration had been made at that time. In addition, they stated that their research had revealed no reported case in which liquefaction had led to a detonation.

ADDITIONAL EVIDENCE—THE POSTEXPLOSION INVESTIGATIONS

In addition to the foregoing, representatives of the New York City Fire Department, the United States Occupational Safety and Health Administration (OSHA), and other experts investigated the explosion and testified before the Grand Jury with respect to their observations and conclusions.

A New York City Fire Marshal who had arrived at the scene just minutes after the explosion described the explosive properties of MS dust, and stated, in effect, that the interreaction of liquid nitrogen and the oxygen in the air created a greater risk of an explosion. He determined that the source of the primary explosion was the "D" machine, and opined that such an explosion would have propelled additional magnesium stearate into the atmosphere, thus causing a second explosion of ambient MS dust. He observed that there was no exhaust system in the Freshen-Up department and concluded that the presence of such a large quantity of MS dust without such a system created a substantial risk of an explosion. He further concluded that despite the presence of a source of ignition, there would have been no explosion but for the quantity of MS present.

An OSHA investigator confirmed the fire marshal's view that there had been a smaller, primary explosion at the "D" machine which propelled additional MS dust into the air and triggered a second, more massive explosion.

Another OSHA investigator learned that the uniplast machines had experienced "freeze-up" problems in the past and that airhoses were being employed for purposes of "de-icing". He also observed that the "die" portion

of the "D" machine (that portion which "punched out" the individual piece of gum) was still heavily iced, although none of the other uniplast machines were similarly afflicted.

A metallurgical engineer for the plant's insurer examined and tested pieces of the machinery after the explosion, and determined that all of them had been exposed to extreme cold, thus causing them to become brittle and fracture. The parts, he noted, were made of low-carbon steel, although a high alloy steel is necessary for resistence to extreme cold.[3]

The Grand Jury also heard testimony from a chemical engineer (a qualified expert who had investigated many of the nation's worst explosion disasters during the past 40 years) who opined that the explosion had occurred as follows: Liquid oxygen had formed and mixed with the settled MS. In addition, the interior of the "D" machine had become brittle from the cold. When some form of ignition was supplied an explosion occurred at the "D" machine, which immediately resulted in a second, more massive explosion. This view was confirmed by another expert witness attached to the United States Mining Enforcement and Safety Administration, who added that the type of electric motor used in the uniplast machines, when operating under normal conditions, would produce sparks of sufficient intensity to ignite magnesium stearate dust.

A chemical engineer who worked as a private consultant investigating chemical plant accidents testified that, in his opinion, there had *not* been a sufficient concentration of ambient MS dust to cause the initial explosion. He stated, however, that liquid oxygen (the product of liquefaction),

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3. Note that prior testimony had indicated that the uniplast machines were never designed to operate in the extreme cold.

when combined with MS, would form a compound highly sensitive to a spark or an impact of any kind and that, in his view, the explosion had occurred when an initial detonation at the "D" machine had dispersed approximately 50 pounds of MS dust which had accumulated near the base of that machine, which in turn exploded. He also testified that ambient dust and dust on the surrounding surfaces were *not* involved in the explosion, and that if the *second* explosion had resulted from dust which had been "jarred loose" from the overhead fixtures, etc., there would have been a gap of several minutes *between* the explosions, as it would have taken that long for the dust to explode. He further stated that before ambient MS dust could become explosive, it would have to be so concentrated that employees would not be able to "see [their] hands in front of [their] face[s]" and concluded that a dust collection system would not have prevented the explosion and that improper wiring in no way contributed to its occurrence.

Another witness, called in by the corporate defendant's counsel to investigate the explosion, confirmed the prior witnesses' view with respect to the time gap between explosions and concluded that ambient dust could not possibly have been sufficiently concentrated to create the risk of an explosion. He characterized as "negligible" the contribution of ambient MS dust to the disaster. From his investigation, the witness concluded that this particular explosion was so unusual that neither the corporate defendant nor its managerial and technical personnel could have anticipated its occurrence.

A New York City Deputy Chief Fire Marshal concluded from his investigation that the concentration of MS dust *was* high enough to create a substantial risk of explo-

sion and that the use of airhoses by the corporate defendant increased that risk. He believed that the installation of a dust collection system would have prevented the explosion, and concluded from his examination of the "D" machine that a particular gear mechanism therein had "snapped" prior to the initial detonation. This snapping, he opined, could have resulted in a mechanical spark. The fire marshal disagreed with the other testimony that there would have been a "time lag" between explosions and that visibility in the plant would have had to be minimal before the dust would become explosive. The physical damage at the site indicated to him that there had been a dust explosion along the ceiling in that area, which he attributed to the fact that there had been an initial detonation, followed almost instantaneously by a second explosion which "mushroomed" upwards. This conclusion was based on the following factors: (1) the ceiling and contiguous duct work were destroyed and scorched, while fixtures hanging down from the ceiling were not disturbed; (2) cinder block walls and windows were pushed out near their tops but not at their bottoms; and (3) the areas around the uniplast machines were hardly disturbed, while there was heavy damage to the areas above them. Thus, dust suspended near the ceiling or propelled there *must* have exploded before it could have settled at a lower level.

On the basis of this evidence, the Grand Jury returned the indictment which is the subject of this appeal.

THE LEGAL STANDARD

Section 125.10 of the Penal Law ("Criminally negligent homicide") provides that "[a] person is guilty of criminally negligent homicide when, with criminal negligence,

he causes the death of another person." Section 125.15 of the Penal Law ("Manslaughter in the second degree") provides, *inter alia,* that "[a] person is guilty of manslaughter in the second degree when: 1. He recklessly causes the death of another person".

"Recklessly" and "criminal negligence" are defined in section 15.05 of the Penal Law as follows:

"3. 'Recklessly.' A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

"4. 'Criminal negligence.' A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

Thus, both culpable mental states require the existence of (1) a "substantial and unjustifiable risk" that a result or a circumstance proscribed by the statute (here, death) will occur or exists, and (2) "a gross deviation" from a reasonable person's standard of care. The distinction is that the "reckless" actor is aware of such risk and consciously disregards it, while the "criminally negligent"

actor, who is *not* aware of such risk, culpably fails to perceive it (*see People v Montanez,* 41 NY2d 53, 56).

In *People v Leichtweiss* (59 AD2d 383, 387), this court held that "on a motion to * * * dismiss an indictment, the court may dismiss only if there is insufficient evidence to sustain the crime charged or any lesser included offense". Since the evidence in this case reveals that the crime of criminally negligent homicide would also be a lesser included offense to the counts charging manslaughter in the second degree (see *People v Stanfield,* 36 NY2d 467; see, also, *People v Perez,* 45 NY2d 204), it follows *ex necessitate* that the *entire* indictment will have to be reinstated if "sufficient evidence" of even the lesser charge exists. As for the test to be employed in evaluating the sufficiency of the evidence before the Grand Jury, it is well established that an indictment will be sustained if based upon prima facie proof that the crime charged has been committed (*People v Haney,* 30 NY2d 328, 335-336; *People v Peetz,* 7 NY2d 147) and that a motion to dismiss will *not* be granted in the absence of a "clear showing" that the evidence adduced, if unexplained and uncontradicted, would not warrant a conviction by a trial jury (*People v Dunleavy,* 41 AD2d 717, affd 33 NY2d 573).

In our opinion, there has been no such "clear showing" that the evidence here is insufficient. To the contrary, it is our belief that the evidence before the Grand Jury was sufficient to establish prima facie that the defendants, at a minimum, failed to perceive a substantial and unjustifiable risk of a deadly explosion, and that such failure constituted a gross deviation from a reasonable person's standard of care.

From the inception of Freshen-Up production in 1974, there were growing indications of problems with MS dust

which the defendants, collectively and individually, failed to address. Although the use of magnesium stearate and liquid nitrogen might not per se have generated a "substantial and unjustifiable" risk of an explosion, their conscious employment in conjunction with machinery which was neither designed nor appropriately modified for their use (or for use in the production of gum) evinces a gross lack of perception. A hazardous condition regarding the ambient MS dust was perceived by a third party (Warner-Lambert's insurer) as early as February, 1976, and the level of that perceptible risk was only increased, rather than diminished, by the use of airhoses and a ventilation system which recirculated the air, thus raising the level of ambient MS dust. In May and June of 1976, there were specific and emphatic warnings that the level of dust was sufficient to result in an explosion, and yet in June and July separate proposals for a dust collection system and an exhaust system to eliminate ambient MS dust were both rejected. Moreover, despite the August, 1976 cleanup, there was evidence that the situation deteriorated dramatically within the next few weeks and that the concentration of MS dust was often as thick as a fog in the period preceding the November 21 explosion. It further appears that on the day immediately preceding the explosion, the "D" machine, which was established to be the site of the detonation, was seen to be smoking and/or burning.

Additional objective evidence tended to show that the "D" machine had been operating at a temperature well below its intended operating range and perceptibly colder than the other uniplast machines, and that the foregoing rendered the advent of liquefaction all the more probable. The evidence that liquefaction could not, or should not have

resulted in detonation is negated by the fact that it was occurring in a piece of machinery which was ill-suited and never designed for operation at such cold temperatures and whose parts, it was testified, might become brittle and fracture as a result. Such breakage was stated to be sufficient to detonate the liquid oxygen or to produce a mechanical spark which could do so. In addition, there was other evidence that the non-dust-proofed motor and related wiring could also have supplied a sufficient spark. Finally, while it could conceivably be argued that the occurrence of liquefaction was itself unforeseeable, the fact remains that there was ample evidence before the Grand Jury from which it could conclude that the explosion per se would not have occurred had an adequate program of MS management been installed at the plant and, at the minimum, that the apparent failure of each of the defendants to perceive and/or initiate (to the greatest extent possible within his particular sphere of authority) an adequate response to the grave risk of death presented by the absence of such a program constituted "a gross deviation from the standard of care that a reasonable person would observe in the situation."

We therefore conclude that when all of the evidence before the Grand Jury is examined together, there is sufficient evidence to make out a prima facie case against each of the defendants for criminally negligent homicide. Thus, all of the counts of the indictment should be reinstated. We hasten to add, however, that the foregoing is predicated on the underlying assumption that questions of credibility and the weight to be accorded the evidence were resolved most favorably to the People (see *People v Leichtweis*, 59 AD2d 383, 389, *supra*), and that a contrary conclusion could

be drawn by the trial jury. As the Court of Appeals noted in *People v Haney* (30 NY2d 328, 336, n 10, *supra*): "[I]t must be observed that it is the Grand Jury which is the arbiter of the credibility and the weight to be given to the evidence [before it]. As we wrote in *People v Eckert* (2 N Y 2d 126, 129): 'That a trial jury might not convict on this evidence is not our concern. The Legislature has specifically relegated the question of whether a trial jury would return a conviction on this evidence to the *judgment* of the Grand Jury'."

Accordingly, the order dated July 26, 1978 and entered upon reargument should be reversed insofar as appealed from on the law, and the indictment reinstated as to each of the defendants.

The appeal from the order dated February 15, 1978 should be dismissed, as that order was superseded by the order entered upon reargument.

Suozzi, J. P. (concurring in part and dissenting in part). I agree that the appeal from the order dated February 15, 1978 should be dismissed. However, I would uphold the dismissal of the indictment on the basis of the well-reasoned opinion of Mr. Justice Leahy at Criminal Term, with the following additional comments.

The instant indictment, which charged the corporate defendant and several of its officers and employees with the crimes of manslaughter in the second degree and criminally negligent homicide, arose out of an explosion which occurred on November 21, 1976 on the fourth floor of the corporate defendant's Long Island City plant where gum was being manufactured. As a result of that explosion, six employees of the corporate defendant died and numerous others were injured.

The crux of the counts in the indictment charging second degree manslaughter was that defendants recklessly caused death by applying magnesium stearate (MS) powder to the gum manufacturing process "in such quantities and in such manner which caused the magnesium powder to accumulate * * * as well as being suspended in air, which, in turn, caused a condition that was intrinsically and inherently dangerous to * * * life and safety * * * and was * * * of such nature and character * * * to constitute a serious explosion hazard * * * creating a substantial and unjustifiable risk of death" and by consciously disregarding the substantial and unjustifiable risk of death of which they had notice "which also constituted a gross deviation from the standard of conduct that a reasonable person would have observed under the circumstances."

The crux of the counts charging criminally negligent homicide was that defendants "failed to perceive the substantial and unjustifiable risk of death" caused by the afore-noted use of the magnesium stearate powder.

The theory of the cause of the fatal explosion as reflected in the indictment was in accord with expert testimony and scientific evidence adduced before the Grand Jury which indicted that when MS is dispersed into the air at or above a minimum density, often referred to as the lower explosion level (LEL), a serious risk of explosion exists upon ignition.

On the other hand, this same expert testimony and opinion also indicated that MS in bulk, inert or settled form, does not create a risk of explosion and, if ignited in this form, it will only burn or smolder.

It was the prosecution's argument at the Grand Jury and on this appeal that the defendants had consciously dis-

regarded the risk of explosion by allowing ambient MS to accumulate in a concetration over the LEL and that this pre-existing ambient MS dust cloud was ignited, causing the explosion.

However, the evidence before the Grand Jury was equally consistent, if not more so, with a finding that the fatal explosion was not caused by a pre-existing concentration of MS over the LEL, but rather was caused by a totally unforeseen initial, smaller explosion which occurred a few minutes earlier at the base of one of the production machines.

Criminal Term, in its decision, stated that "the consensus of expert opinion given before the Grand Jury" was that this initial explosion was the result of a cryogenic phenomenon called "liquefaction". Liquefaction involves the concentration into volatile liquid form of the oxygen in the atmosphere which has come into contact with an extremely cold substance, which in this case was the otherwise harmless liquid nitrogen (LN_2) used by the corporate defendant as a cooling agent in its manufacturing process. This theory of the initial explosion was best expressed by a representative of the Bureau of Mines of the Mining Enforcement and Safety Administration, who was asked by OSHA to investigate the accident and who testified that: "it was most likely that the liquid explosive-type reaction came from an oxygen enriched liquid air reaction with the magnesium stearate."

In his report to OSHA, this expert stated that: "The dust explosion was preceded by an initial explosive-type reaction. The most likely initial explosive reaction was oxygen—enriched liquid air and *undispersed* magnesium stearate * * *. The initial explosive-type reaction blew

apart * * * Machine D, dispersed the magnesium stearate dust and either directly ignited the dispersed dust or caused an electrical arc which ignited the dust'' (emphasis supplied).

Implicit in this theory advanced by the experts was the proposition that the initial explosion caused the settled and harmless MS dust to become dispersed into the atmosphere in a heavy enough concentration to produce the second explosion which was an MS dust explosion.

However, in contrast to the substantial risk of an explosion in the presence of a pre-existing concentration of ambient MS dust over the LEL, the experts testified that the risk of an explosion of inert MS dust in the presence of liquid oxygen created by liquefaction (and the subsequent dispersal of MS into the atmosphere) was totally unforeseen. These same witnesses emphasized that liquid nitrogen is one of the most widely used cryogenic materials due to the fact, as Criminal Term acknowledged, that liquid nitrogen is ''non-toxic, non-combustible and vaporizes quickly and without dangerous effect when exposed to room temperatures; furthermore, because of its inherent stability, it is often used in fire extinguishers.'' A cryogenic expert, with the United States Department of Commerce, called upon by OSHA to investigate the accident, reported that ''[s]everal hundred million dollars of liquid nitrogen are used annually without incident.'' In discussing the relatively unfamiliar field of cryogenics another expert testified: ''there is absolutely no way that the people at the company, including technical and managerial, could've anticipated this event. It's completely unforeseen.''

Criminal Term also correctly noted that neither the corporate defendant's insurer, its suppliers of both LN_2

and its machines, nor any government agency, all of whom were familiar with the operations of the plant, ever warned the defendants of any risk associated with the use of liquid nitrogen, and settled or inert MS dust.

Under these circumstances, the indictment as against all of the defendants should be dismissed.

LAZER, GULOTTA and SHAPIRO, JJ., concur in *Per Curiam* opinion; SUOZZI, J. P., concurs as to the dismissal of the appeal from the order dated February 15, 1978, but otherwise dissents and votes to affirm the order dated July 26, 1978 insofar as appealed from, with an opinion, in which O'CONNOR, J., concurs.

Order of the Supreme Court, Queens County, dated July 26, 1978, reversed insofar as appealed from, on the law, and, upon reargument, indictment reinstated.

Appeal from an order of the same court, dated February 15, 1978, dismissed as academic. That order was superseded by the order dated July 25, 1978, made upon reargument.

APPENDIX C

Decision of the Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

2 No. 281

THE PEOPLE &c.,

Respondent,

v.

WARNER-LAMBERT COMPANY, doing business under the name and style of WARNER-LAMBERT, Co., AMERICAN CHICLE DIVISION, *et al.*,

Appellants.

(281) Leonard Garment, Judah Gribetz, Douglas M. Parker, John P. Hederman, & William P. Laino, NYC, for appellant Warner-Lambert; Stanley S. Arkin, Mark S. Arisohn, & Arthur T. Cambouris, for appellants Kraft & Harris; Andrew M. Lawler, Jr. & Dennis E. Milton, NYC, for appellants O'Mahoney & O'Rourke.

John J. Santucci, DA, Queens County (Charles N. Walsh, Barry A. Schwartz, & A. Brent Blackburg of counsel) for respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

JONES, J.

Although they were aware that there was a broad, undifferentiated risk of an explosion in consequence of ambient magnesium stearate dust arising from the procedures employed in its manufacturing operations, the corporate and individual defendants may nonetheless not be held criminally liable, on the theory of either reckless or negligent conduct, for the deaths of employees occasioned when such an explosion occurred where the triggering cause thereof was neither foreseen nor foreseeable.

This case is before us on appeal from an order of the Appellate Division which reversed an order of Supreme Court granting defendants' motion to dismiss the indictment on the ground that the evidence before the Grand Jury was not legally sufficient to establish the offenses charged or any lesser included offenses (CPL § 210.20, subd 1, par [b]). On such a motion the standard of judicial scrutiny is whether there was "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof * * *" (CPL § 70.10, subd 1). In the somewhat unusual circumstances of this case defendants introduced extensive evidence before the Grand Jury; for our purposes, however, the evidence must be viewed in the light most favorable to the People, and it may be legally sufficient "although it does not even provide 'reasonable cause' to believe that the defendant committed the crime charged"

(Denzer, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 70.10, p 348). We describe the factual context out of which this indictment arose from that standpoint, recognizing that in our description no note is taken of the considerable exculpatory evidence introduced on behalf of defendants.

Defendant Warner-Lambert Co. is a manufacturing corporation which produces, among other items, Freshen-Up chewing gum. The individual defendants were officers or employees of the corporation. Defendant Kraft was vice-president in charge of manufacturing; defendant Harris was the director of corporate safety and security; defendants O'Mahoney and O'Rourke were, respectively, plant manager and plant engineer of the Warner-Lambert facility located at 30-30 Thompson Avenue in Long Island City, New York, which was the situs of the events out of which this indictment arose. The indictment charges each defendant with six counts of manslaughter in the second degree in violation of Penal Law, § 125.15 and six counts of criminally negligent homicide in violation of Penal Law, § 125.10, in consequence of the deaths of six employees which resulted from a massive explosion and fire at the Long Island City Warner-Lambert plant about 2:30 a.m. on November 21, 1976.

On the day on which the explosion occurred, Freshen-Up gum, which is retailed in the shape of a square tablet with a jelly-like center, was being produced at the Warner-Lambert plant by a process in which filled ropes of the gum were passed through a bed of magnesium stearate (MS), a dry, dust-like lubricant which was applied by hand, then into a die-cut punch (a Uniplast machine) which was sprayed with a cooling agent (liquid nitrogen), where the

gum was formed into the square tablets. Both the MS (normally an inert, organic compound) and the liquid nitrogen were employed to prevent the chicle from adhering to the sizing and cutting machinery, the tendency to adhere being less if a dry lubricant was used and the punch was kept at a low temperature. The process produced a dispersal of MS dust in the air and an accumulation of it at the base of the Uniplast machine and on overhead pipes; some also remained ambient in the atmosphere in the surrounding area.

Both MS and liquid nitrogen are considered safe and are widely used in the industry. In bulk, MS will only burn or smoulder if ignited; however, like many substances, if suspended in the air in sufficient concentration the dust poses a substantial risk of explosion if ignited. The minimum concentration at which an explosion can occur is denominated the "lower explosion level" (LEL). Liquid nitrogen, with a boiling temperature of minus 422 degrees Fahrenheit, is an effective cryogenic which might play a part in the process of "liquefaction"—here, the production of liquid oxygen in the course of the condensation of air on its exposure to a source of intense cold. Liquid oxygen is highly volatile, is easily ignited and, if ignited, will explode. Among possible causes of such ignition of either liquid oxygen or ambient MS are electrical or mechanical sparks.

On November 21, 1976 defendant Warner-Lambert was operating six Uniplast machines in the production of Freshen-Up gum on the fourth floor of its Long Island City plant. The machines were in almost constant operation; however, at the time of the catastrophic explosion near the end of one of the work shifts only one machine

(designated the "D" machine) was in operation and employees were engaged in removing settled MS dust from the base of that machine and from overhead pipes by broom sweeping and by the use of airhoses. Suddenly an explosion occurred in the area of the operating machine, followed almost immediately by a second, much larger explosion accompanied by flames which caused injuries to more than 50 workers in the area (six of whom did not survive) and extensive damage to the building and equipment, which was attributed to burning of ambient dust and explosion rather than general fire. Thorough post-catastrophe investigation eliminated intentional or "man-caused" ignition as the origin of the event. A New York City Fire Marshal and an investigator for the United States Occupational Safety and Health Administration, both of whom examined the scene, testified before the Grand Jury that a primary explosion had occurred at the "D" machine which dispersed added MS dust into the atmosphere and could have caused the second, greater explosion. There was testimony that the ceiling of the floor below the "D" machine had been covered with peeling paint, indicating that the temperature of that machine was colder than the others and that an examination of the machine itself after the explosion had shown that its base, made of cast iron, had cracked, perhaps by reason of the cold. An employee present at the time of the occurrence testified that he had observed a spark in the area of the "D" machine immediately prior to the event. Although there was no direct proof as to what had triggered the early-morning disaster, the People introduced expert testimony hypothesizing that there might have been a mechanical sparking induced by a break-up of metal parts of the

Uniplast machine. Also presented was testimony by one of the People's experts who theorized that liquid oxygen produced through liquefaction occurring in the Uniplast machine was ignited by the impact of a moving metal part and that this touched off the dispersed MS dust present.

With respect to the quantity of ambient MS dust in the area of the Uniplast machines (the presence of which was the basis for the People's submission to the Grand Jury of evidence against the defendants ultimately indicted), there was proof that an inspection of the plant by Warner-Lambert's insurance carrier in February, 1976 had resulted in advice to the insured that the dust condition in the Freshen-Up gum production area presented an explosion hazard and that the MS concentration was above the LEL, together with recommendations for installation of a dust exhaust system and modification of electrical equipment to meet standards for dust areas. Although a variety of proposals for altering the dust condition were considered by the individual defendants in consultations and communications with each other and some alterations in the MS application were made, both ambient and settled MS dust were still present on November 21, 1976, as the result of an executive decision to work toward the eventual elimination of MS entirely by modification of the Freshen-Up equipment. This modification had been accomplished with respect to only one Uniplast machine at the date of the explosion, when approximately 500 pounds of MS a day were still being used in Freshen-Up production. Employees were wearing face masks and goggles to protect their eyes and breathing passages, and just prior to the tragedy, when sweeping and airhosing of accumulated MS were in progress, there was rising dust and a "heavy fog" or "mist" all around.

The charges of manslaughter in the second degree and criminally negligent homicide laid against the corporate and individual defendants are each dependent on two interrelated provisions of the Penal Law. As to manslaughter in the second degree, the following provisions are pertinent:

> "125.15 Manslaughter in the second degree
>
> "A person is guilty of manslaughter in the second degree when:
>
> "1. He recklessly causes the death of another person; * * *."
>
> "15.05 Culpability; definitions of culpable mental states
>
> "The following definitions are applicable to this chapter:
>
> "* * *
>
> "3. 'Recklessly.' A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto."

As to criminally negligent homicide the following provisions are pertinent:

> "§ 125.10 Criminally negligent homicide
>
> "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."

"§ 15.05 Culpability; definitions of culpable mental states

"The following definitions are applicable to this chapter:

"* * *

"4. 'Criminal negligence.' A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

For each of these crimes there must be a "substantial and unjustifiable risk", and "[t]he risk must be of such nature and degree that disregard thereof [or, the failure to perceive it] constitutes a gross deviation from the standard of conduct [or, care] that a reasonable person would observe in the situation". The essence of manslaughter in the second degree is awareness accompanied by disregard of the risk; for criminally negligent homicide the essence is failure to perceive the risk (*People* v *Stanfield,* 36 NY2d 467, 470). With respect to each crime the culpable conduct of the defendant must have been the cause of the death of the other person or persons.

There have been relatively few reported cases (other than those involving vehicular homicide) in which judicial attention has been focused on the proof required to establish the commission of the crimes of manslaughter in the second degree or criminally negligent homicide. None has been drawn to our attention and our research has dis-

closed none in which the statutory provisions were applied to deaths occurring in the course of manufacturing operations.[1]

1. Inasmuch as we find the causation issue hereafter discussed to be decisive of this appeal, we assume for purposes of this decision, without deciding, that Penal Law, Sections 125.10 and 125.15 are broad enough to cover deaths occurring in the course of manufacturing operations. We note, however, that no case applying these sections or the predecessor sections to such operations has been found; that no legislative history which mandates that conclusion has been found, either by the parties from whom we solicited submissions on that subject prior to reargument or by our independent research; and that tenable arguments for and against it can be made.

The arguments for are that the present sections were enacted as part of the general revision of the Penal Law effective September 1, 1967, that the Commission Staff Notes on the Proposed Penal Law (adopted in 1967) stated with respect to the section on criminally negligent homicide that (p 335) "The proposed crime * * * is one of general application, and no need or desirability is seen for individual, particularized provisions or offenses addressed to fatally negligent conduct in specific areas of activity", that Section 5.00 of the Penal Law declares that "The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law", that the Practice Commentaries prepared by the former Counsel to the Commission on Revision state that Section 125.10 "applies to a wide spectrum of fatal conduct of both commission and omission", that the sections were fashioned on the Model Penal Code and like that Code are stated in language which is clearly broad enough to include manufacturing operations.

The arguments against are that the history of the American Law Institute's adoption of the Model Penal Code contains nothing other than the broad language of the sections to indicate that manufacturing operations were intended to be covered and that the history of the predecessor sections of the Penal Law (Sections 1052 and 1053-a to 1053-f) is equivocal. The introductory language of Section 1052 was internally narrowed by the inclusion within the section of paragraphs describing particularized conduct—"Women producing miscarriage", "Negligent use of machinery", "Mischievous animals", "Overloading passenger vessel", "Persons in charge of steamboats", "Persons in charge of steam engines", "Acts of physicians while intoxicated", and "Persons making or keeping gunpowder contrary to law". Sections 1053-a and -b dealt explicitly with criminal negli-

(footnote continued on next page)

There can be no doubt that there was competent evidence before the Grand Jury here which, if accepted as true, would have been sufficient to establish the existence of a broad, undifferentiated risk of explosion from ambient MS dust which had been brought to the attention of defendants. It may be assumed that, if it be so categorized, the risk was both substantial and unjustifiable. The issue before us, however, is whether defendants could be held criminally liable for what actually occurred, on theories either of reckless or negligent conduct, based on the evidence submitted to this Grand Jury, viewed in the light most favorable to the People. The focus of our attention must be on the issue of culpability, taking into account the conduct of defendants and the factors both of foreseeability and of causation, all of which in combination constitute the

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gence in the operation of a motor vehicle; Sections 1053-c and -d covered criminal negligence in the use of a firearm or a long bow while hunting; and Sections 1053-e and -f addressed criminal negligence in the operation of a vessel. The paragraph in Section 1052 captioned "Negligent use of machinery" (although facially so broad that if read literally it would have made unnecessary the particularization in coordinate internal paragraphs of that section) was first incorporated in our criminal law statutes in 1881 (L 1881, ch 676, § 194). No legislative history has been found which discloses the purpose for its introduction. It was not included in the draft proposal of 1865 and first appears in the proposal as amended in 1879. It may be argued, therefore, that prior to the enactment of the 1967 revision of the Penal Law there was no statutory proscription of general applicability and none specifically addressed to manufacturing operations.

The pertinent policy considerations (e.g., the protection of New York residents against injury or death knowingly or recklessly inflicted and of the State against the burden of having to care for and support persons so injured or killed on the one hand, as opposed to the possible adverse effect on the State's economy of extending criminal liability to manufacturing operations on the other) are more properly for the Legislature than for the courts (cf Fletcher, The Theory of Criminal Negligence: A Comparative Analysis, 119 U of Pa L Rev 401). It may be that the Legislature will wish to eliminate all equivocality.

ultimate amalgam on which criminal liability may or may not be predicated.

First, we look at the evidence as to the actual event or chain of events which triggered the explosion—evidence which may only be characterized as hypothetical and speculative. There was direct testimony by eyewitnesses, confirmed by reconstruction of the physical evidence, that two explosions occurred. The first was a low-order detonation, occurring approximately two seconds before the major explosion, at the base of the "D" Uniplast machine, which was itself found to be in a substantially fragmented condition with gears, metal shafts, and other parts broken up and displaced; the second, occurring in rapid succession, was a major explosion accompanied by fire which caused the massive destruction and personal injuries. The prosecution hypothesizes that under what it describes as "the most plausible of theories" the initial detonation was attributable to mechanical sparking resulting from the break-up of the metal parts of the Uniplast machine, possibly occasioned by the machine's having become overheated or overloaded, by vibration, or by slipping of components. Testimony supporting this hypothesis included descriptions of the condition of the machine after the event, expert testimony that the physical evidence suggested mechanical failure prior to the first explosion and testimony of prior instances in which the machine had become overheated or metal parts had broken off. The District Attorney adds that "ignition produced by an electrical spark or arc emission from the non-explosion proof, over loaded Uniplast motor was not ruled out either".

Another explanation for the initial explosion was offered by an expert called by the prosecution who hypothe-

sized that liquid oxygen, produced through liquefaction as air condensed on the liquid nitrogen-cooled parts of the "D" machine, dripped onto settled MS dust at the base of the Uniplast, became trapped there and then, when subjected to the impact caused by a moving metal part, reacted violently, causing ignition of already dispersed MS.

Viewed most favorably to the People, the proof with respect to the actual cause of the explosion is speculative only, and as to at least one of the major hypotheses—that involving oxygen liquefaction—there was no evidence that that process was foreseeable or known to any of the defendants. In sum, there is no proof sufficient to support a finding that defendants foresaw or should have foreseen the physical cause of the explosion. This being so there was not legally sufficient evidence to establish the offenses charged or any lesser included offense.

It has been the position of the People that but-for causation is all that is required for the imposition of criminal liability. Thus, it is their submission, reduced to its simplest form, that there was evidence of a foreseeable and indeed foreseen risk of explosion of MS dust and that in consequence of defendants' failure to remove the dust a fatal explosion occurred. The chain of physical events by which the explosion was set off, i.e., its particular cause, is to them a matter of total indifference. On oral argument the People contended that liability could be imposed if the cause of the explosion were the lighting of a match by an uninvited intruder or the striking of a bolt of lightning. In effect they would hold defendants to the status of guarantors until the ambient dust was removed. It thus appears that the People would invoke an expanded application of proximate cause principles lifted from the civil law of torts.

We have rejected the application of any such sweeping theory of culpability under our criminal law, however. We recently considered concepts of criminal culpability grounded in recklessness or negligence in *People* v *Kibbe* (35 NY2d 407).[2] In that case the defendants had abandoned their helplessly intoxicated robbery victim in subfreezing temperatures, without shoes or eyeglasses, by the side of an unlighted highway, and he was shortly thereafter struck and killed by a passing motorist. The critical issue in the case was whether the defendants should be held criminally liable for murder when the particular cause of death was vehicular impact rather than freezing. Under the theory now advanced by the People it would have been irrelevant that death had been the consequence of one particular chain of causation rather than another; it would have been enough that the defendants exposed their victim to the risk of death and that he died. That, of course, was not the analysis of culpability that we adopted. Recognizing that "[a] distance separates the negligence which renders one criminally liable from that which establishes civil liability" (*People* v *Rosenheimer*, 209 NY 115, 123)—both as to quantum and content of proof—we held that "the defendants should not be found guilty unless their conduct 'was a cause of death sufficiently direct as to meet the requirements of the *criminal*, and not the *tort*, law' " (35 NY2d 412). "We subscribe to the requirement that the defendants' actions must be a sufficiently direct cause of the ensuing death before there can be any imposition of criminal liability, and recognize, of course, that this standard is greater than that required to serve as a basis for tort liability" (*id.*, p. 413). Thus, we were concerned for the

2. For subsequent proceedings see *Henderson* v *Kibbe* (431 US 145).

nature of the chain of particularized events which in fact led to the victim's death; it was not enough that death had occurred as the result of the defendants' abandonment of their helpless victim. To analogize the factual situation in the case now before us to that in *Kibbe* it might be hypothesized that the abandoned victim in *Kibbe* instead of being either frozen to death or killed when struck by a passing motor vehicle was killed when struck by an airplane making an emergency landing on the highway or when hit by a stray bullet from a hunter's rifle—occasions of death not reasonably to have been foreseen when the defendants abandoned their victim.

In view of our disposition of this appeal on the ground that, inasmuch as the evidence before the Grand Jury was not legally sufficient to establish the foreseeability of the actual immediate, triggering cause of the explosion, defendants cannot be held criminally culpable, we have no occasion to reach or consider whether the steps that they took with respect to the general risk of explosion were a gross deviation from the standard of care or conduct that a reasonable person would have observed in the situation.

For the reasons stated, we conclude that there was not legally sufficient evidence in this case on the premise of which any jury could permissibly have imposed criminal liability on any of these defendants.

Accordingly, the order of the Appellate Division should be reversed and the indictment dismissed.

* * *

Order reversed and the indictment dismissed. Opinion by Jones, J. Concur: Cooke, Ch. J., Jasen, Gabrielli, Meyer, Sweeney and Cardamone, JJ.

Decided November 20, 1980

No. 80-1409

IN THE

Supreme Court of the United States

October Term, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

WARNER-LAMBERT COMPANY Doing Business Under the Name of WARNER-LAMBERT CO., AMERICAN CHICLE DIVISION, ARTHUR KRAFT, ED HARRIS, JAMES O'MAHONEY and JOHN O'ROURKE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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SUMMARY OF ARGUMENT

The judgment of the New York State Court of Appeals was rendered on November 20, 1980 and the Petition is therefore untimely under Rule 20 of this Court. Further, no federal statute, treaty or constitutional issue was ruled on by any court below, nor did Petitioner make any constitutional claim whatever in any court below. The decisions of the New York courts involved solely a determination of New York law.

ARGUMENT

THE PETITION SHOULD BE DENIED

This brief is filed on behalf of all Respondents in opposition to the petition of the People of the State of New York ("Petitioner") for a writ of certiorari to review a unanimous judgment of the New York State Court of Appeals dismissing an indictment charging Respondents with six counts of reckless manslaughter and criminally negligent homicide.

A. The Petition is Untimely

Petitioner asserts that the judgment of the New York Court of Appeals for which Petitioner seeks review was entered on December 2, 1980. Thus, pursuant to Rule 20.1 the 60 day period within which to file a petition for certiorari in accordance with this Court's rules would have terminated on January 31, 1981. The present petition, however, was not served and filed with this Court until February 19, 1981 and, therefore, is clearly untimely.[1]

1. In fact, the judgment was entered by the New York Court of Appeals and became final for purposes of certiorari on the date it was rendered, *i.e.* on November 20, 1980. *See* Appendix A2; *Department of Banking* v. *Pink*, 317 U.S. 264 (1942), *rehearing denied*, 318 U.S. 802 (1943); *Supreme Court Rule* 20.4. Accordingly, the petition should have been filed on or before January 19, 1981.

While this Court has, on occasion, accepted untimely petitions, there are no mitigating circumstances which would make such action appropriate in this case. *Compare, e.g., Schacht v. United States*, 398 U.S. 58, 63–65 (1970).

B. The Decision Below Involved Solely a Determination of New York Law

Petitioner purports to invoke the jurisdiction of the Court pursuant to 28 U.S.C. § 1257(3). That statute provides jurisdiction to review final state court judgments by writ of certiorari only where the validity of a federal statute or treaty is at issue, or where a claim has been asserted below that a state statute violates federal law, or where a claim has been made below expressly based on a federally created title, right, privilege or immunity. The highest state court must have expressly ruled on the federal question sought to be reviewed, *Louisville & Nashville Railroad* v. *Higdon*, 234 U.S. 592 (1914); *Raley* v. *Ohio*, 360 U.S. 423 (1959) or the federal question must have been "specially set up or claimed" in the state court proceeding so that it was properly before the highest state court, *Beck* v. *Washington*, 369 U.S. 541, *rehearing denied*, 370 U.S. 965 (1962); *Oxley Stave Co.* v. *County of Butler*, 166 U.S. 648, 655 (1897). None of the requisite criteria are present in this case.

No federal treaty or statute was involved and the New York Court of Appeals did not rule on any federal question. Respondents' motions to dismiss the indictment in the state court were litigated and decided solely under the standards of the New York Criminal Procedure Law. Respondents' motions turned solely on the issue of whether

there was legally sufficient evidence, as defined by state statutory and decisional law, that Respondents were or should have been aware of a substantial and unjustifiable risk of death under circumstances amounting to a gross deviation from reasonable care. In deciding this issue, the Court of Appeals clearly determined an issue of *state*, not federal, law. It held that, under New York law, causation is an essential element of the crimes charged and that there was no evidence presented to the grand jury that Respondents were or should have been aware of at least one possible cause of the explosion – the formation of volatile liquid oxygen from the use of liquid nitrogen ("liquefaction"). (Opinion of the New York State Court of Appeals, *reprinted as* Appendix C to the Petition, at 55a).

Petitioner asserts that such a decision was "tantamount" to a finding by the New York State Court of Appeals that a trial would violate Respondents' due process rights (Petition at 5). The assertion is totally groundless. The decisions below were all concerned, expressly and exclusively, with the interpretation and application of the New York statute. They made no reference whatever to due process.

It is equally clear that no federal question was specially set up, or claimed in any manner, in the courts below. Throughout the proceedings below, Petitioner, like the New York courts, addressed itself solely to the interpretation of the New York statute. Accordingly, there is no basis on which the jurisdiction of this Court can be invoked.

CONCLUSION

For all the foregoing reasons, the petition of the People of the State of New York for a writ of certiorari should be denied.

Respectfully submitted,

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March, 1981

Appendices

LIST OF CORPORATE AFFILIATION PURSUANT TO RULE 28.1

Respondent Warner-Lambert Company has no parent. The following are the subsidiaries (except wholly owned subsidiaries and companies wholly owned by such subsidiaries) and affiliates of Respondent Warner-Lambert Company:

Bermer Tool & Die, Inc. (U.S.)
Cor Candies Corporation (U.S.)
Filtronics Ltd. (U.S.)
Tetra Sales (U.S.)
Vergo, S. A. (France)
Laboratorios Substantia C.A. (Venezuela)
Velarca, S.A. (Venezuela)
Laboratorios Promaco, S.A. (Peru)
Meito Adams K.K. (Japan)
Parke Davis & Sankyo, Ltd. (Japan)
Parke Davis & Company, Limited (Pakistan)
Parke Davis (India) Limited
Parke Davis (Private) Limited (Iran)
Warner - Hudnut (Lanka) Limited (Sri Lanka)
Warner - Hindustan Limited (India)
Warner - Lambert (Pakistan) Limited
C. Reichert Optische Werke, A.G. (Austria)
Goedicke A.G. (Germany)
Kessi-Werke Max Messmann G.m.b.h. (Germany)
P.T. Warner-Lambert Parke-Davis Indonesia (Indonesia)
Pharma-Deko Ltd. (Nigeria)
Sisterna Integrado Prescripciones Offalmicas Optoservicio Ltda. (Columbia)
Perma-Sharp Celik Sanayii Anonim Sirketi (Turkey)
Perma-Sharp Boudros Hellas S.A. (Greece)

Remittitur

Court of Appeals
State of New York

915-77

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

2 No. 281

The People &c.,

Respondent,

v.

Warner-Lambert Company, doing business under the name and style of Warner-Lambert, Co., American Chicle Division, et al.,

Appellants.

The appellant(s) in the above entitled appeal appeared by Mudge Rose Guthrie & Alexander; Robert Kasanof & Bart M. Schwartz; Arkin & Arisohn; and Andrew M. Lawler, Jr.; *the respondent(s) appeared by* John J. Santucci, District Attorney, Queens County.

The Court, after due deliberation, orders and adjudges that the order is reversed and the indictment dismissed. Opinion by Jones, J. Concur: Cooke, Ch.J., Jasen, Gabrielli, Meyer, Sweeney and Cardamone, JJ.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Queens County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 20, 19 80.